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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 449

ST. REGIS PAPER COMPANY, *Petitioner,*

v.

GEORGE A. STUART, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief for Respondent in Opposition.

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OPINION BELOW.

The opinion of the District Court is unreported, but is set out in the Appendix to the Petition at page 37. The opinion of the Court of Appeals for the First Circuit (Appendix pp. 23-35 of Petition) is reported at 214 F.(2d) 759.

JURISDICTION.

The jurisdiction requirements are as set forth in the Petition.

QUESTIONS PRESENTED.

The questions presented by the Petition are:

1. Did the court below err in holding that there was substantial evidence to warrant the findings of the jury on the special verdicts submitted to them by the trial court?

2. Does the Petition present any question that would justify the granting of a writ of certiorari?

CONCISE STATEMENT OF THE CASE.

This case involves the claim of the Respondent for commissions earned by him from the sale of the Petitioner's flour and potato bags under a letter agreement dated July 5, 1935 set forth in its entirety on page 4 of the Petition.

The respondent, George Stuart, prior to July 1935 had been an agriculturist, having held the position of Director of the Bureau of Markets of the Pennsylvania Department of Agriculture (R. 39-40). He also held the position of Secretary of an organization known as the Pennsylvania Millers Association, whose members were large users of paper bags of the type manufactured by the Petitioner, (R. 44). Upon his resignation in 1935 as Director of the Bureau of Markets, the Respondent, although inexperienced as a salesman, accepted employment with the Petitioner to sell flour and potato bags upon the terms and conditions set forth in said letter agreement (R. 46-47). This was done at the instigation of one Albert Carey, who had been employed for some time by the Petitioner as an experienced salesman (R. 43). It was then agreed that for a time the Respondent and Carey would work together as a "team" (although not exclusively) so that the Respondent could introduce Carey to his friends in the Millers' associ-

ation and at the same time Carey could teach the Respondent the "art" of salesmanship (R. 48, 87). When both of these goals had been accomplished, it was contemplated that each would then go his own independent way (R. 122-124). In fact, the Respondent and Carey did separate early in 1937 and the Respondent commenced promotional activities in Maine (R. 50, 192). His efforts were not very successful due to the unavailability of a suitable bag (R. 49). However, by 1941, a proper bag had been developed and, at the request of the Petitioner, the Respondent moved from Pennsylvania closer to the potato market and commenced to spend most of his time soliciting sales of these bags (R. 52-53). On this occasion, the Petitioner confirmed the fact that the Respondent would be entitled to commissions on the sale of these bags (R. 52-53).

During the war years and through the 1945-1946 season, the Respondent devoted almost all of his time to soliciting sales of potato bags, but due to paper shortages, cancellations and wartime conditions, he was not able to ascertain whether or not his quota had been exceeded (R. 60). In 1947, however, and each year thereafter, he exceeded his quota (R. 177-180, Plaintiff's Ex. 11, R. 260). At a sales meeting in 1947 he inquired about his commissions, but was informed that the Petitioner had lost the contract (R. 169). The Respondent tried to locate his copy, but was unable to find it until 1950 (R. 64-65). In the meantime, following his inquiry in 1947, the Petitioner began to credit the Respondent's sales to other salesmen, some of whom had nothing to do with potato bag sales (R. 63) and, finally, in August 1947, the Respondent was discharged (R. 67). He continued to search for his copy of the contract and when he finally found it he promptly made demand for his commissions, which demand was refused (R. 65-67).

Action was commenced in the Superior Court of the

Commonwealth of Massachusetts and removed to the United States District Court by the Petitioner (Petition p. 3). The case was tried before a jury at the conclusion of which the trial judge submitted special questions to the jury as set forth on page 7 of the Petition. The jury found for the Respondent in the amount of Forty-six Thousand Eighty-one and 83/100 (46,081.83) Dollars, including interest (R. 247). The trial court recomputed the interest and entered judgment for the Respondent in the amount of Forty-four Thousand Eighty-two and 59/100 (44,082.59) Dollars (Petition p. 37). The Court of Appeals affirmed the judgment of the District Court (Appendix pp. 23-36 of the Petition).

ARGUMENT.

I. The Decision of the Court Below Is Correct.

No serious argument is made that the letter agreement of July 5, 1935 is so unambiguous as to not require extrinsic evidence to aid in its construction. Rather the Petitioner argues that there was no such evidence and even suggests that the agreement is so vague and indefinite that it is unenforceable. Where a contract is ambiguous and unclear, extrinsic evidence of the surrounding circumstances and the conduct of the parties is admissible to aid in its interpretation.

> *Brooklyn Life Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273, 24 L. Ed. 410, 412
> *Lowrey* v. *Hawaii*, 206 U.S. 206, 27 S. Ct. 622, 51 L. Ed. 1026
> *Lawrence National Bank* v. *Rice*, 82 Fed.(2d) 28, 33 Rehearing Den. 83 Fed (2d) 642, 647 (C.A. 10)

The circumstances surrounding the making of the contract were carefully developed at the trial. The evidence

disclosed that the Respondent, who had pioneered in the use of paper bags for packing potatoes, was a logical person for the Petitioner to employ to promote the sale of such bags (R. 38-47). He was also a valuable person to the Petitioner by reason of his wide acquaintance among flour bag users who were potential customers. The obvious purposes of the Respondent's employment were to use him primarily to promote the sale of potato bags, particularly in the State of Maine, and to introduce Carey, a salesman for the Petitioner, to the members of the Pennsylvania Millers Association so that Carey could sell flour bags to them. (The Respondent, however, retained a few of the larger flour bag accounts). (R. 137).

The conduct of the parties under the agreement further substantiated the Respondent's claim that the agreement was not joint as to Carey and himself and that he was entitled to commissions under the agreement from the sale of potato bags. The evidence clearly showed that Stuart and Carey worked together as a team only for a relatively short time so that Carey could teach the Respondent the duties of a salesman and the Respondent could effect the contemplated introductions. (R. 122-124). As soon as these objectives had been accomplished, Carey and the Respondent parted and never thereafter worked together (R. 124). The Respondent concentrated on promoting sales in Maine and moved closer to the territory in 1941, at which time his rights to commissions were confirmed by the Petitioner's salesmanager (R. 52-53). The Petitioner consistently treated the Respondent separately and independently from Carey, the third party to the agreement. Invoices of sales showed credit to either the Respondent or Carey alone (R. 19, 27). Salary checks were made payable to the Respondent alone and his expense vouchers were submitted without reference to Carey (R. 132). Respondent's salary was adjusted without refer-

ence to Carey (R. 133) and Respondent was discharged for reasons independent of Carey (R. 67).

It is submitted that the circumstances surrounding the making of the contract and the actions of the parties under it all constitute evidence on which the jury could find, as it did in special verdict Number One (1) that the commission agreement was "several" and not "joint" (R. 229, 247). In view of this finding, there can be no question but what the Respondent is entitled to recover his commissions, in an action by himself alone, even though actual words of severance may be lacking from the agreement.

Guth v. *Texas Co.*, 155 Fed.(2d) 563, 566, (C.A. 7) Cert. Den., 332 U.S. 844

Emmeluth v. *Home Benefit Assoc.*, 122 N.Y. 130, 25 N. E. 234

2 *Williston on Contracts*, (Rev. Ed.) Sec. 325 (page 943)

The agreement between the Petitioner and the Respondent was mutually enforceable. Their contract states clearly the parties, products to be sold, salary and expenses to be allowed, the territory to be covered and the duty of each salesman to solicit miscellaneous accounts. The Petitioner, however, contends that one provision of the contract, that, providing for the payment of the commissions was so vague as to unenforceable.

The obligation to pay commissions was several, as found by the jury in its answer to Question One, and a wholly proper and logical formula for determining the commissions due to the Respondent was present to the jury (R. 176-177). The total quota of Seven Million Five Hundred Thousand (7,500,000) bags was to be divided between the two men, Three Million Seven Hundred Fifty Thousand (3,750,000) bags per man. Each was entitled

to a commission for the amount sold over that minimum, provided that the company received at least total sales of Seven Million Five Hundred Thousand (7,500,000) bags. If there was a deficiency in the quota of either the respondent or Carey, the one who exceeded his quota would be paid a commission only on his sales which exceeded his quota *and* the deficiency in the quota of the other. This formula the trial court (R. 179-180) and the Circuit Court (Petition Appendix pp. 31-32) found to be reasonable and enforceable and was clearly within the tenor and intent of the contract. The jury was wholly justified in its verdict on the third question submitted by the trial court (R. 237-247).

Manson v. *Curtis*, 223 N.Y. 313, 320, 119 N. E. 559, 561

There was also substantial evidence to warrant the jury finding in answer to the second question of the trial court (R. 234) that the contract had not been abandoned or altered so that the respondent agreed to be paid on a basis of salary and expenses without commissions (R. 247). It is true that early in the trial, before most of the evidence had been presented, the trial judge remarked that he felt that the Respondent's contention was most "extraordinary" (R. 65), but the evidence that thereafter developed clearly substantiated Respondent's claim. When Respondent first thought he exceeded his quota in 1947, he made inquiry about his commissions, but was told that the Petitioner's copy of the agreement could not be found (R. 169). The Respondent could not find and could not remember the details of the agreement and was not in a position to prove his claim (R. 169). He continued to search for his copy and when he finally found it, he made a prompt claim for his commissions (R. 66-67). In the meantime, after the Respondent's inquiry, the

Petitioner began to deprive him of credit for sales (R. 63) (attributing some to a salesman who testified that he had nothing to do with such sales) (R. 37) and finally discharged him (R. 67). The jury could infer from this that the Petitioner sought in this manner to avoid responsibility for commissions it knew existed. The fact that Stuart continued to search for his agreement is evidence of overt actions indicating an intention to not abandon the agreement. Since reasonable men might differ as to the inferences to be chosen from the evidence, Question Number Two (2) (R. 234, 247) was properly submitted to the jury.

Bagwell v. *Susman*, 165 Fed.(2d) 412, 415 (C.A. 6)

The Respondent submits that the record contains substantial extrinsic evidence to aid the court and jury in interpreting the agreement and in awarding damages. The evidence was conflicting on most of the questions. The Petitioner offered evidence to the effect that the Respondent and Carey split up because they were not working satisfactorily together and that the agreement was then terminated (R. 207). These assertions were denied, however, by the Respondent and even by Carey (R. 196), the Petitioner's own witness, and did not have to be believed, as the Court of Appeals observed (Petition, Appendix p. 32). In a case where there is extrinsic evidence in aid of the construction of a written agreement, some of which is disputed, the court must submit the question to the jury for determination as the trial court did. This is the law of both Massachusetts and New York.

Atwood v. *City of Boston*, 310 Mass., 70, 75, 37 N. E. 2nd 131, 134

U. S. Printing & Lithographing Co. v. *Powers*, 233 N.Y. 143, 135 N. E. 225

II. The Petition Presents No Question Justifying A Writ of Certiorari.

There is no conflict between the decisions below and the decisions of other Federal Courts. The petitioner has sought to establish such a conflict and thereby a basis for a writ of certiorari in this case. What the petitioner actually asserts is that the courts below erred in applying rules of law, not that they determined applicable rules of law differently in this case than in similar cases. The Petitioner has argued:

a. The contract was unambiguous,
b. There was no extrinsic evidence to assist in its interpretation and,
c. The court erred in submitting questions concerning the contract to the jury (Petition pages 9-11).

In fact, the trial court (R. 230) and the Circuit Court (Petitioner's Appendix p. 30) found that the contract was ambiguous and the record contains substantial extrinsic evidence to aid in its interpretation. The propriety in such a case of submitting questions with respect to the agreement to the jury has been argued above in this brief and is too obvious for further citation of authority.

The Petition does not present any question for consideration within the provisions of Rule 19 of this Court (Revised Rules of the Supreme Court of the United States adopted April 19, 1954). The Petition does allege (Petition p. 16) that because the courts below failed to follow the correct Massachusetts Conflict by Laws rule, because the trial court submitted questions concerning the agreement to the jury (Petition page 20) and because the Court of Appeals considered certain matters alleged not in evidence (Petition p. 21) this court should grant certiorari.

An examination of the record (R. 250) and the opinion of the Circuit Court of Appeals (Petition's Appendix pages 29-30) clearly indicates that both courts applied New York law in accordance with the Massachusetts conflicts of law rule in construing the agreement. The Petitioner's complaint is actually that the courts did not follow its interpretation of New York law. It is, of course, proper procedure in Federal Courts to refer to a jury questions concerning the interpretation of ambiguous written agreements where there is extrinsic evidence, some of which is disputed, as in the present case. The record contains ample justification for all conclusions of fact made by the Circuit Court.

The charge that the procedure of the trial court calls for the exercise by this court of its power of supervision (Petition p. 22) is remote and unfounded, but the Respondent feels that it should be answered. An examination of the record discloses that the trial judge recognized the legal issues involved in the construction of the contract and the conduct of the parties there under. He properly determined that the disputed evidence posed a question for the jury and on his own motion submitted the case to them on special questions so that the jury could separately consider each issue raised rather than render a single verdict. *Cate* v. *Good Bros. Inc.*, 181 Fed.(2d) 146, 148 (C.A. 3), Cert. Den. 340 U.S. 826, 71 S.Ct. 60, 95 L. Ed. 606. If this case is notable in any way (which is doubtful) it is notable in that it is a good example of the proper utilization of the function of a jury in a commercial case. Rather than a violation of the long established course of judicial proceedings, this case represents the very embodiment of those elements that make up the proper discharge of judicial functions by the courts below.

The Petition actually presents the case for review solely upon factual issues which have been passed upon by the

District Court, whose decision was affirmed by the Circuit Court of Appeals. This court had held that even where certiorari has been granted, it will not review concurrent findings of fact by two courts below in the absence of an obvious and exceptional showing of error.

> *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537-538, 93 L. Ed. 672, 677

Practically the sole question raised by the petition is the propriety of submitting interrogatories concerning the written contract to the jury. This question depends essentially upon an evaluation of the evidence and this court has long held that it will not issue writs of certiorari in such cases.

> *Southern Power Co.* v. *North Carolina Public Service Co. et al*, 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 413
> *Houston Oil Company of Texas et al* v. *Goodrich et al*, 245 U.S. 440, 38 S. Ct. 140 62 L. Ed. 385

CONCLUSION.

It is respectfully submitted that this petition for a writ of certiorari should be denied for the foregoing reasons.

Respectfully submitted,

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